Ng Chin Chai (as public officer and Honorary Secretary of the Badminton Association of Malaysia) v Inter-Sports Marketing Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S 22NCVC-46 OF 2011
AMELIA TEE ABDULLAH J
11 MARCH 2013

Contract — Assignment — Rights to assign — Indemnity — Marketing agreement — Exclusive rights assigned to defendant — Whether all rights and obligations under agreement only between plaintiff and defendant — Whether plaintiff consented and agreed to assignment — Whether letter between defendant and third party amounted to valid and binding contract

Contract — Privity of contract — Marketing agreement — Tournament — Exclusive rights assigned to defendant — Whether defendant failed to honour assignment — Whether plaintiff has right to enforce terms of marketing agreement against any party other than defendant — Whether parties' intention was to assign rights to third party — Whether defendant failed to make out its case against third party on balance of probabilities — Whether defendant liable to plaintiff for outstanding sum

Sometime in 2005, the Badminton Association of Malaysia ('BAM') was selected to stage the World Badminton Championship ('WBC') event in 2007. Pursuant to the staging of the said championship, BAM had granted marketing and exploitation rights of the various commercial and broadcasting rights of the event to the defendant vide a marketing agreement. Vide this agreement, BAM had assigned the rights to the defendant to organise the WBC and in consideration thereof the defendant was to pay BAM a sum of USD900,000. A sum of USD595,000 had been paid and a sum of USD305,000 remained due and outstanding. Hence, the plaintiff claimed against the defendant the above outstanding sum. The defendant however disputed the plaintiff's claim on the ground that the exclusive rights to the tournament had been transferred to Sports Media Productions Sdn Bhd ('SMP'). The defendant thus claimed indemnity in respect of the plaintiff's claim from the third party. However, the third party denied any liability towards the defendant on the grounds that there was no concluded agreement between the parties. The third party also raised other issues, inter alia, lack of consideration, that not all rights were surrendered to SMP, and that the effect and intention of the letter between the defendant and them had been overtaken by events where the sponsorship, advertising and commercial rights for the WBC 2007 had been given to First

Events Promotions Sdn Bhd ('FEP'). The issue before this court was whether the letter dated 3 October 2006 between the defendant and SMP amounted to a valid and binding contract between them.

Held, allowing the plaintiff's claim with costs:

(1) The marketing agreement was between BAM and the defendant. SMP who had been brought in by the defendant as a third party for indemnity was not a party to the marketing agreement. Applying the doctrine of privity of contract, the plaintiff would have no right to enforce the terms of the marketing agreement against any party other than the defendant. Although the plaintiff was informed about the alleged sub-licence or 'agreement' between the defendant and SMP, and the fact that the plaintiff would have known about sub-licenses or other arrangements with SMP and FEP, however the above knowledge would not change the fact that the marketing agreement was between the plaintiff and the defendant and all the rights and obligations under the said agreement would only be between the plaintiff and the defendant (see para 104).

(2) The defendant's obligations to pay the plaintiff was not absolved by the alleged sub-licence as it had, when informing the plaintiff about the sub-licence, clearly expressed and confirmed that it remains the contracting party with the plaintiff that would be responsible for all the terms of the marketing agreement, including the financial obligations. The defendant cannot go back on what it had contracted and undertaken to be responsible. As such, the defendant was liable to the plaintiff for the outstanding sum of USD305,000 (see para 110).

(3) The defendant had failed to make out its case against the third party on a balance of probabilities. Quite apart from the fact that the letter of 3 October 2006 would appear to be less than a concluded agreement between the defendant and SMP, there was also an additional question of whether T Arasu, who agreed and accepted the alleged sub-licence from the defendant, was authorised by the board of directors of SMP to do so. In this regard, DW1 as a common director of the defendant, SMP and FEP had failed to draw strict lines between his roles in the various companies. Sub-licences and rights cannot be arbitrarily passed from one to another without proper authorization as to both the giving and the acceptance. Terms and conditions that govern the passing of rights have to clearly spelt out. When this was not done, the defendant cannot fall back on the alleged knowledge of certain individuals who wear more than one hat in the three different companies (see para 111).

[Bahasa Malaysia summary

Pada sekitar tahun 2005, Persatuan Badminton Malaysia ('BAM') dipilih untuk mengelolakan pertandingan Kejuaraan Badminton Antarabangsa

('KBA') dalam tahun 2007. Berikutan pengelolaan kejuaraan tersebut, BAM memberikan hak pemasaran dan eksploitasi kepada beberapa perniagaan dan hak penyiaran pertandingan tersebut kepada defendan melalui satu perjanjian pemasaran. Melalui perjanjian ini, BAM memberikan hak kepada defendan untuk mengelolakan KBA dan sebagai balasan defendan sepatutnya membayar BAM sejumlah USD900,000. Sejumlah USD595,000 telah dibayar dan jumlah USD305,000 masih terhutang dan tertunggak. Maka, plaintif menuntut terhadap defendan jumlah yang tertunggak tersebut. Defendan, walau bagaimanapun, mempertikaikan tuntutan plaintif atas alasan bahawa hak eksklusif untuk kejuaraan tersebut telah dipindahkan kepada Sports Media Productions Sdn Bhd ('SMP'). Defendan, oleh itu, menuntut indemniti berkaitan dengan tuntutan plaintif daripada pihak ketiga. Walau bagaimanapun, pihak ketiga menafikan sebarang tanggungjawab terhadap defendan atas alasan bahawa tidak ada perjanjian yang muktamad di antara pihak-pihak. Pihak ketiga juga membangkitkan isu-isu lain, antara lainnya, balasan yang tidak mencukupi, bahawa bukan kesemua hak telah diberikan kepada SMP, dan bahawa kesan dan niat surat di antara defendan dan mereka telah diambil alih oleh kejuaraan di mana hak-hak tajaan, pengiklanan dan komersil untuk KBA 2007 telah diberikan kepada First Events Promotions Sdn Bhd ('FEP'). Isu di hadapan mahkamah ini adalah sama ada surat bertarikh 3 Oktober 2006 di antara defendan dan SMP membentuk kontrak yang sah dan mengikat antara mereka.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Perjanjian pemasaran adalah di antara BAM dan defendan. SMP yang telah dibawa masuk oleh defendan sebagai pihak ketiga untuk indemniti bukanlah pihak kepada perjanjian pemasaran tersebut. Menggunapakai doktrin priviti kontrak, plaintif tidak sepatutnya mempunyai hak untuk menguatkuasakan terma-terma perjanjian pemasaran tersebut terhadap mana-mana pihak selain daripada defendan. Walaupun plaintif diberitahu mengenai sub-lesen yang didakwa atau perjanjian di antara defendan dan SMP, dan fakta bahawa plaintif mempunyai pengetahuan mengenai sub-lesen dan lain-lain pengaturan dengan SMP dan FEP, walau bagaimanapun pengetahuan tersebut tidak akan mengubah fakta bahawa perjanjian pemasaran tersebut adalah di antara plaintif dan defendan dan kesemua hak dan kewajipan di bawah perjanjian tersebut adalah hanya di antara plaintif dan defendan (lihat perenggan 104).

(2) Kewajipan defendan untuk membayar kepada plaintif tidak bebas dengan sub-lesen yang didakwa kerana ia telah, apabila memberitahu kepada plaintif mengenai sub-lesen tersebut, menjelaskan dan mengesahkan bahawa ia kekal pihak yang berkontrak dengan plaintif yang akan bertanggungjawab terhadap kesemua terma perjanjian pemasaran, termasuk tanggungjawab kewangan. Defendan tidak boleh menafikan apa yang ia telah berkontrak dan mengaku janji sebagai

tanggungjawabnya. Oleh itu, defendan bertanggungjawab kepada plaintif bagi jumlah tertunggak sebanyak USD305,000 (lihat perenggan 110).

(3) Defendan telah gagal membuktikan kesnya terhadap pihak ketiga atas imbangan kebarangkalian. Di sebalik fakta bahawa surat bertarikh 3 Oktober 2006 adalah jelas bukan perjanjian muktamad di antara defendan dan SMP, terdapat persoalan tambahan sama ada T Arasu, yang bersetuju dan menerima sub-lesen yang didakwa daripada defendan, telah diberi kuasa oleh lembaga pengarah SMP untuk berbuat demikian. Dalam perkara ini, DW1 sebagai pengarah umum defendan, SMP dan FEP telah gagal membezakan peranannya dalam syarikat-syarikat berlainan. Sub-lesen dan hak tidak boleh diberikan oleh seorang kepada seorang yang lain dengan sewenang-wenangnya tanpa kuasa yang sewajarnya terhadap kedua-dua pemberian dan penerimaan. Terma-terma dan syarat-syarat yang mentadbir pemberian hak mestilah dinyatakan dengan jelas. Apabila ini tidak dilakukan, defendan tidak boleh bersandar atas pengetahuan yang didakwa mengenai individu-individu tertentu yang mempunyai lebih daripada satu peranan dalam tiga syarikat yang berbeza (lihat perenggan 111).]

Notes

For cases on privity of contract, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5497–5500.

Cases referred to

Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd [2010] 1 MLJ 822; [2010] 3 CLJ 818, CA (refd)

Suwiri Sdn Bhd v Government of the State of Sabah [2008] 1 MLJ 743; [2008] 1 CLJ 123, FC (refd)

Woolley Development Sdn Bhd v Stadco Sdn Bhd(No 1) [2011] 6 MLJ 111; [2010] 7 CLJ 73, CA (refd)

M Mogan Mariappan (Ho Mogan & Noraini) for the plaintiff.
Ravi G (Isa Mohamad and Aida Hassan with him) (Ravi, Aida & Partners) for the defendant.
Leela Jesuthasan (Faiz & Co) for the third party.

Amelia Tee Abdullah J:

[1] The plaintiff, Ng Chin Chai, *selaku pegawai awam serta setiausaha kehormat Persatuan Badminton Malaysia*, claims against the defendant, Inter-Sports Marketing Sdn Bhd, for the recovery of USD305,000 being the balance consideration sum under a marketing agreement dated 15 December 2005 entered into between the parties.

[2] The plaintiff's claim is disputed by the defendant who contends that their exclusive rights to the tournament had been transferred to Sports Media Productions Sdn Bhd ('SMP') vide an agreement via a letter dated 3 October 2006. The defendant thus claims to be indemnified in respect of the plaintiff's claim from the third party.

[3] The third party, Sports Media Promotions Sdn Bhd ('SMP'), denies any liability to indemnify the defendant on the grounds that the letter dated 3 October 2006 was not a concluded agreement and hence not binding on the parties. It has raised other issues, inter alia, a lack of consideration, that not all rights were surrendered to SMP, and that the effect and intention of the letter had been overtaken by events where the sponsorship, advertising and commercial rights for the World Badminton Championship 2007 had been given to First Events Promotions Sdn Bhd ('FEP').

THE PLAINTIFF'S CASE

[4] The plaintiff called a total of four witnesses. Dato' Sri Mohd Nadzmi Mohd Salleh ('PW1') is the president of the Badminton Association of Malaysia ('BAM') which is the governing body for badminton sports in Malaysia. In 2005, the international governing body for badminton sports is the International Badminton Federation ('IBF'), and it is presently known as the Badminton World Federation ('BWF'). PW1 testified that sometime in 2005, Malaysia was selected to stage the World Badminton Championship event in 2007. Vide a marketing agreement dated 15 December 2006 (pp 19–40 of CB1), BAM had granted marketing and exploitation rights to the various commercial and broadcasting rights of the event to Inter-Sports Marketing Sdn Bhd, the defendant.

[5] PW1 signed the marketing agreement on behalf of BAM. Vide this agreement, BAM had assigned the rights to the defendant to organise the World Badminton Championship ('WBC') and in consideration thereof the defendant was to pay BAM a sum of USD900,000. USD595,000 has been paid and a sum of USD305,000 remains due and outstanding.

[6] During cross-examination, PW1 was referred to the Sponsorship Agreement Proton-BWF World Badminton Championship 2007 ('sponsorship agreement') between Perusahaan Otomobil Nasional Sdn Bhd and First Events Promotions Sdn Bhd ('FEP') dated 16 January 2007. PW1 knew about this agreement and was a witness to it in his capacity as President of BAM. He was referred to Recital D of the sponsorship agreement which states that 'FEP has acquired the said exclusive marketing, advertising and

commercial rights to the Tournament from ISM' but claimed not to be aware whether with this agreement all the defendant's rights had been transferred to FEP.

[7] According to PW1, although he is the President of BAM, he did not deal with the accounts department in BAM on a daily basis. When referred to a BAM 'Statement As At 31st December 2009' at p 46 of CB1 where the names 'Inter-Sports Marketing Sdn Bhd (Sports Media Promotions Sdn Bhd)/First Events Promotions Sdn Bhd' appear in the heading, PW1 was unable to explain why the heading of the statement appeared in that manner.

[8] During cross-examination by learned counsel for the third party, PW1 testified that he was not aware of any clause in the marketing agreement which allowed the defendant to assign or sub-license their rights under the said agreement. He was not aware of any request from the defendant to BAM for permission to sub-license. He was also not aware of any clause in the agreement which would entitle BAM to claim interest or costs on a solicitor-client basis.

[9] He explained that as president, he did not get involved with all the nitty-gritty of the documents that were signed or the management of BAM. That was not expected of him as president. Like any organisation, this would be cascaded down to the officer-in-charge.

[10] Ng Chin Chai ('PW2') is the public officer cum honorary secretary of BAM. In his capacity as honorary secretary of BAM since June 2010, he claims to have full knowledge of the status and activities of BAM from his own personal knowledge, from briefings from BAM management and office bearers as well as from records and documents in the BAM Secretariat.

[11] According to PW2, sometime in 2005, BAM was selected to stage the World Badminton Championship ('WBC') event in 2007. Pursuant to the staging of the said championship, BAM had granted marketing and exploitation rights of the various commercial and broadcasting rights of the event to the defendant where a written marketing agreement dated 15 December 2005 was signed between the parties. The signatory for BAM was Dato' Sri Mohd Nadzmi Mohd Salleh (PW1), the president of BAM, and the signature witnessing the BAM signature is that of the former secretary, Mr Ganga.

[12] PW2 cites the important and relevant terms in the marketing agreement to be as follows:

(i) Clause 3

This clause sets out the grant to the defendant of the sole and exclusive right 'of all kinds of commercial exploitation of all commercial, promotional, advertising, marketing and licensing rights in the Territory and all broadcasting rights in Malaysia arising from or relating to BAM and/or the Event'.

Under Clause 3.1.1, this right includes the exclusive right to brand the event by the inclusion of the Title Sponsor's Logo.

(ii) Clause 4

Under Clause 4, the defendant shall pay to BAM the Sponsorship Money 'as advised by BAM in the instalments and on the dates according to the payment schedule as set forth in Schedule 3'. Under Schedule 3, the total consideration sum of USD 900.000-00 was to be paid as follows:

One month before the Event … USD400,000-00

Within one month after the Event … USD250,000-00

Within two months after the Event … USD250,00000

[13] During cross-examination by learned counsel for the defendant, PW2 was asked about the grant of rights under cl 3 of the marketing agreement (p 24 of CB1). He agreed that rights were given to the defendant 100%. There were no provisions in the said agreement for the transfer of those rights.

[14] The WBC 2007 event successfully took place from 13–19 August 2007. However, the defendant has not fully paid up the sum of USD900,000. To date, BAM has only received a sum of USD595,000 thus leaving an outstanding sum of USD305,000. Not all payments received by BAM towards the account of the defendant were made by the defendant. According to PW2, some payments were made by FEP, which payments were received towards the account of the defendant. During re-examination, he testified that it was quite normal for payments to be received from parties other than the contracting parties. When such payments were received, they would be accounted for in the account of the contracting party.

[15] According to PW2, the defendant was given 'the sole and exclusive rights of all forms of commercial exploitation of all commercial, promotional, advertising, marketing, and licensing rights in the territory and all broadcasting rights in Malaysia arising from or relating to BAM and/or the Event'. Sometime in October 2006, BAM had received a letter from the defendant informing that it had sub-licensed a part of the rights granted to them to their associate company called Sports Media Promotions Sdn Bhd ('SMP'). BAM did not raise any objections to the sub-licensing by the defendant to SMP because in their letter dated 5 October 2006 (p 41 of CB1), the defendant had stated that 'ISM shall remain the contracting party with the BAM and be responsible for the terms of the agreement, including the financial obligations'.

[16] During cross-examination, PW2 was referred to the Sponsorship Agreement Proton-BWF World Badminton Championship 2007 between Perusahaan Otomobil Nasional Sdn Bhd and First Events Promotions Sdn Bhd dated 16 January 2007 (pp 1–19 in NAB) and Recital D in the said agreement. According to PW2, this is a sponsorship agreement as opposed to a marketing agreement. A marketing agreement gives rights to advertise and promote whereas a sponsorship agreement is about sponsoring the event and carrying the name of the company. PW2 denied that the consideration for the marketing agreement and the sponsorship agreement were the same. The consideration was USD900,000 under the marketing agreement whereas under the sponsorship agreement, it was USD1,200,000.

[17] The defendant was in charge of the sponsorship. There were many sponsors involved in the tournament and the main or title sponsor was Proton.

[18] PW2 was referred to the defendant's letter dated 16 Mac 2006 enclosing a cheque for RM186,600 (p 49 of CB1). He was uncertain if this was the only letter received by BAM from the defendant regarding the payment of monies for the WBC. He agreed that the receipt issued by BAM in respect of this payment (p 50 of CB1) is the only receipt issued by BAM to the defendant and that other receipts would have been issued to other parties.

[19] The contracting parties in this case are BAM and the defendant. However, the defendant had informed BAM that some payments would be coming in from other parties. He agreed that BAM did not enquire why but had accepted whatever payments that were received.

[20] PW2 was unable to say if FEP was 100% involved in the 2007 WBC. Reference was made to cl 7.3 of the sponsorship agreement (p 11 of NAB) which states, inter alia, that 'It is hereby acknowledged that the Tournament is basically a sport tournament organized and managed by FEP and BAM …' but PW2 claimed not to be aware if FEP was handling the tournament. According to him, BAM had given the rights of organising the WBC to the defendant and he would not know after looking at cl 7.3 if the defendant was no longer in charge.

[21] During cross-examination by the third party on whether the defendant had obtained clearance from BAM before the sub-licensing, the court was informed that from their records, BAM had never granted any sub-licensing rights to the defendant.

[22] According to the payment schedule of the marketing agreement, the first payment should have been made one month before the event, namely in July 2007. However, vide a letter dated 16 Mac 2006 the defendant had sent a

cheque for RM186,600. PW2 thus agreed that part-payment was made by the defendant more than a year before the championship. Based on the statement at p 47 of CB1, USD100,000 was paid on 31 Mei 2007, some two months before the championship. PW2 agreed that looking at these payments; the defendant was not complying with the payment schedule. According to PW2, whilst BAM had received the monies, it had not agreed to any variation as to the payment schedule.

[23] PW2 was questioned as to whether the marketing agreement distinguished between the percentages of payment for broadcasting rights as opposed to commercial rights. His answer was that the defendant was granted commercial rights. There was no apportionment. The USD900,000 was for commercial rights worldwide and broadcasting rights in Malaysia.

[24] PW2 confirmed that BAM had received no monies from SMP in respect of the WBC.

[25] Vide letters of demand dated 14 June 2010 (p 42 of CB1) and 3 September 2010 (pp 43–44 of CB1) from BAM and Messrs Ho Mogan & Nor'Aini respectively, demands were made to the defendant to settle the balance of the sponsorship money of USD305,000. As per the statement of claim, BAM is also claiming interest and costs and expenses including solicitors' fees on a solicitor client basis. During cross-examination, he agreed that there was no clause in the marketing agreement which states that BAM can charge 8% judgment interest or claim costs on a solicitor-client basis.

[26] Manoharan a/l PP Krishnasamy ('PW3') has been the finance and marketing manager in the employment of BAM since 2005 and in such capacity would have full knowledge of the status of financial matters of BAM, both from his own personal knowledge as well as from the records and documents in the possession of BAM.

[27] According to the marketing agreement entered into between BAM and the defendant in December 2005 (pp 19–40 of CB1), the sponsorship money payable to BAM was USD900,000. However, despite the event having successfully taken place from 13–19 August 2007, BAM had only received USD595,000. As such, the defendant still owed BAM USD305,000.

[28] PW3 had enlightened the court as to the various amounts that had been received by BAM towards the account of the defendant under the marketing agreement. Reference was made to the 'Statement as at 31st December 2009' which was admittedly prepared by PW3 but signed by Kenny Goh ('PW4'). The statement shows that:

(i) On 16.3.2006, BAM received USD 50,000-00 (RM 186,600-00)

towards two championship events, namely, the Asian Badminton Championship and the World Badminton Championship ('WBC'). Upon clarifying with Mr. Velu from the defendant, PW3 was informed that USD 40,000-00 was for the WBC whilst USD 10,000-00 was for the Asian Badminton Championship. The conversion rate used was USD 1 to RM 3-732;

(ii) On 31.5.2007, BAM received a sum of USD 100,000-00 vide Public Bank cheque No. 402772 for RM 337,200-00 issued by FEP (pages 50 & 51 of CB1). The conversion rate then was USD 1 to RM 3.372;

(iii) On BAM's instructions to the defendant, a sum of USD 200,000-00 less bank charges was paid directly to the International Badminton Federation (IBF) on behalf of BAM in respect of the World Badminton Championship 2007 event. This payment was accounted as USD 200,000-00 on 31.7.2007 into the defendant's account (page 52 of CB1); and

(iv) Payment of USD 255.000-00 accounted into the defendant's account on 22.10.2007. Payment was received vide Public Bank Berhad cheque No. 540460 for RM 848,130-00 from FEP and BAM issued its receipt for RM 848,130-00 at the exchange rate of USD 1 to RM 3.326 (pages 53,54 & 55 of CB1).

[29] Other than the afore stated four payments, BAM had not received any further payments from the defendant or any other party towards the account of the defendant for the WBC 2007 Event.

[30] As at 13 July 2007 the defendant had paid USD345,000. No payments were received from the defendant after 19 August 2007. When there was no movement in the account, he had brought the matter to the attention of the BAM secretary.

[31] To PW3's knowledge, BAM had given to the defendant the sole and exclusive rights to all forms of commercial exploitation of all commercial, promotional, advertising, marketing, and licensing right in the territory and all broadcasting rights in Malaysia arising from or relating to the WBC 2007 Event.

[32] However, he agreed that sometime in October 2006, BAM had received a letter from the defendant informing that they had sub-licensed a portion of the rights granted to them to their associate company called Sports Media Promotions Sdn Bhd ('SMP'). BAM had not raised any objections because in their letter dated 5 October 2006, the defendant had stated that they remain the contracting party with BAM and would be responsible for the terms of the agreement, including the financial obligations.

[33] Despites demands made by BAM and their solicitors to the defendant for the balance of the sponsorship money, the defendant had failed to pay the balance sum of USD305,000.

[34] During cross-examination, PW3 was asked how BAM would know why FEP was paying payments since FEP was not a party to the marketing agreement between BAM and the defendant. PW3's response was that the defendant had written to say that there would be monies coming into their account directly from the sponsors. He identified p 41 as the letter received from the defendant. The court takes note that nowhere in the said letter is it stated that monies would be coming into the account from sponsors. During cross-examination by learned counsel for the third party, PW3 corrected himself and said that there is no letter from the defendant to BAM saying that monies would be coming in directly from other sponsors.

[35] PW3 was cross-examined as to the discrepancy between the amount of USD200,000 stated at p 47 compared with the amount of USD199,985 stated at p 52 of CB1. His explanation was that because the amount of the charges was so little (USD15.17), BAM was given credit for the whole amount. He disagreed that there was another payment of USD200,000 made on 31 July 2007 by FEP or a payment of USD15,000 from the defendant on 15 June 2000 which had not been taken into account in BAM's accounts.

[36] The plaintiff also called Goh Chee Keong @ Kenny Goh ('PW4') as a witness. He is the general manager in the employment of BAM since January 2007 and he gave essentially the same evidence as PW3. He claimed to be directly involved in organising the WBC 2007 Event.

[37] With reference to the defendant's letter dated 5 October 2006 (p 41 of CB1) informing BAM of their sub-licence to Sports Media Productions (SMP), PW4 admitted that he knew of the existence of the said letter. He admitted that BAM had not sent any letter to the defendant objecting to the sub-licensing to SMP.

[38] With reference to the sponsorship agreement dated 16 January 2007 (pp 1–19 of NAB), PW4 told the court that he knew about this agreement only much later. He disagreed that this sponsorship agreement would supersede or override the marketing agreement between BAM and the defendant. He further disagreed that the same rights that were granted to the defendant at p 24 of CB1 had been transferred to FEP.

[39] PW4 was referred to the two BAM financial statements as at 31 December 2009 (p 46) and as at 31 July 2010 (p 47) respectively. These documents were signed by him and he had approved their contents. He

claimed to have knowledge of all the debtors of BAM. With regard to the WBC 2007, the defendant was BAM's biggest debtor. Prior to sending a notice of demand in 2010, they had called the defendant and spoken to them about the outstanding account.

[40] With reference to the defendant's letter dated 1 July 2010 where the defendant had expressed its regret that BAM was now demanding from them the outstanding sum when it had all throughout dealt directly with SMP, it is PW4's evidence that BAM's contract is with the defendant and that vide the defendant's letter dated 5 October 2006, they had clearly stated that they 'remain the contracting party with BAM'.

[41] During cross-examination by learned counsel for the third party, PW4 agreed that Mr Velu's name appeared in the letters and documents in dealings with BAM. However, he was uncertain if it was Mr Velu who had brought the cheques from FEP to BAM. However, he testified that when he had spoken to the defendant in respect of the settlement of dues, the person he had spoken to was Mr Velu.

[42] PW4 agreed that BAM had not received anything from SMP in relation to the WBC 2007. With reference to para 3 of the defendant's letter which states, inter alia, that BAM had 'dealt with and received payments from and acknowledged SMP as the Party in regards to the obligations and responsibilities of the agreement', PW4 agreed that the said paragraph was not true.

[43] PW4 was also queried as to the discrepancy as to the outstanding amount that was due from the defendant. At p 42, the figure is stated as RM978,978 whereas the amount outstanding as stated at p 47 is RM991,250. PW4 confirmed that the amount outstanding is USD305,000 equivalent to RM991,250.

THE DEFENDANT'S CASE

[44] Inter-Sports Marketing Sdn Bhd, the defendant, called three witnesses in support of its case. Rethinavelu R Thangiah ('DW1') has been a director of the defendant, Inter-Sports Marketing Sdn Bhd, since 30 September 1985. The defendant was incorporated in 1985 and is involved in sports marketing promotions. It would acquire the marketing rights of events and secure sponsorship for the events. The SSM documents would show that DW1 holds 140,000 shares whilst his wife and fellow director, Mun Lai Cheng, holds 110,000 shares. DW1 agreed that he was director and shareholder of the defendant at the time of the tournament.

[45] First Events Promotions Sdn Bhd ('FEP') was incorporated in 2005. It was initially started by DW1, Mohamad Taufik bin Hj Omar ('Taufik'), and S Tirunaavuckarsu a/l Singaram ('Arasu') to handle major tennis championship events. DW1 admitted that he and Arasu were both directors and shareholders in 2006. Adlin Murtadza only became a director on 1 July 2007.

[46] Sports Media Promotions (SMP) was set up to handle sports events in 2006. It has a paid up capital of only RM 100. According to DW1, the persons involved in setting up SMP were himself, Taufik and Arasu. He agreed that he was a director and shareholder of SMP at the material time. Adlin Murtadza was only appointed on 1 July 2007.

[47] DW1 testified that he was initially involved in SMP and FEP because the directors would seek his advice because of the defendant's and DW1's track record and experience in handling sports marketing promotions. He would advise them with regard to putting together the proposals, how to package sports events etc.

[48] According to DW1, he was appointed a director of SMP on 7 July 2006 but had resigned since 2008. He claimed that he had resigned because there was no more roles for him in SMP and there was no point in his continuing as a director of the company if he was no longer actively involved. However during cross-examination, he was referred to the SSM search on SMP conducted on 26 April 2010 (pp 7–10 of CB1) which still lists him as a director. Notwithstanding this, DW1 insisted that he had resigned since 2008.

[49] DW1 testified that the defendant is his company and independent and has no connection with SMP and FEP. However, SMP and FEP are connected in that the directors and persons running the two companies are the same. He claimed to have no connection with SMP and FEP except for providing professional advice to them. According to him, the plaintiff was well aware of the relationship between SMP and FEP. The persons from the plaintiff who were dealing with the defendant, SMP and FEP were the then Honorary Secretary, Mr Ganga Rao, Mr Kenny Goh and Mr Mano. During cross-examination, he admitted that his evidence about having no connection with SMP and FEP was untrue and that in fact, he was a director and shareholder of both SMP and FEP at the material time.

[50] DW1 admitted signing the marketing agreement for the World Badminton Championship 2007 on behalf of the defendant. His signature was witnessed by Mr T Arasu, the director/COO of SMP and a shareholder of FEP. He claimed that the defendant 'had offered its services to the plaintiff to acquire the commercial rights from the plaintiff in staging the tournament in

return for a financial consideration'. 'Commercial rights' means rights in sponsorship, advertising, marketing, and local television rights in relation to the tournament.

[51] According to DW1, the main organizer of the tournament was the plaintiff who was responsible for the technical and commercial aspects of the tournament. He claimed that the defendant was not involved when the tournament was held in August 2007 and was only involved in the earlier stage when the marketing agreement was signed.

[52] During cross-examination, DW1 admitted that as the common director for all the three companies, he was dealing with BAM in respect of the tournament. However, he claimed to be aware of the preparations for the tournament only during the initial stage, meaning the seven to eight months after the signing of the marketing agreement. He denied that he was dealing with BAM right up to the tournament in 2007.

[53] Clause 6.15 of the marketing agreement provides that BAM shall 'notify and allow ISM or their representatives to attend and participate in each and every Organising Committee meeting'. DW1 testified that although there was an organising committee for the tournament, the defendant was not given any minutes of the organising committee meetings.

[54] With reference to the payment schedule in Schedule 3 of the marketing agreement, DW1 testified that the defendant had complied with the schedule. In answer 39 of his witness statement, he testified that the defendant had made an advance payment of USD50,000 to BAM in 2006 at the latter's request. He himself had brought the USD50,000 payment to BAM and BAM had issued him with a receipt (p 48). He further agreed that it was on his instructions that USD40,000 was allotted as payment for the WBC and the balance of USD10,000 was allocated for the ABC. He confirmed that since the consideration in the marketing agreement was in US Dollars, payment was also made in US Dollars and converted into Ringgit Malaysia. The exchange rate for each payment would therefore fluctuate.

[55] According to DW1, the defendant had subsequently transferred the commercial rights to SMP pursuant to an 'agreement' dated 3 October 2006 (pp 57–58 of CB1). SMP had then procured sponsorship monies from sponsors such as Proton, government bodies and other minor sponsors. This 'agreement' was signed by DW1 on behalf of the defendant whilst Mr T Arasu had signed on behalf of SMP.

[56] DW1 was cross-examined at length as to whether he had authority to sub-license the rights granted to it by the plaintiff. The court records the following exchanges:

PUT:In the Marketing Agreement, there is no provision to sub-license the rights.

ANS:Agree.

PUT:I put to you that prior to your letter dated 3.10.2006 you had never requested nor obtained approval from BAM to sub-license.

ANS:Disagree. We did request. We did not obtain approval in writing. There was a verbal agreement and we also submitted a letter to BAM.

PUT:I put to you that your statement at clause 2.1 that you had obtained the necessary clearance to sub-license the rights is untrue.

ANS:Disagree.

PUT:It was only on 5.10.2006 that is after the sub-licensing on 3.10.2006, that you informed BAM.

ANS:Yes, agree. No, there is nothing in this letter (page 41) which confirms that we had received the approval to sub-license.

PUT:I put to you that the purported sub-licensing is invalid.

ANS:Disagree.

[57] Reference was made to the terms of this 'agreement'. Under cl 2.4, SMP undertook and agreed to comply with and adhere to all the terms and conditions of the marketing agreement between BAM and the defendant. DW1 explained that the defendant had transferred the commercial rights to SMP because the latter was interested in acquiring those rights and the defendant was willing to assign those rights. No payments were made by SMP when the defendant agreed to transfer the said rights.

[58] During cross-examination, DW1 agreed that by this letter, the defendant was purporting to give a sub-licence to another company in which he was also a director and shareholder. He claimed not to know if the other directors of SMP had agreed to accept the sub-licence from the defendant. He claimed that he could not remember whether the directors of SMP had signed a resolution to authorise Arasu to accept the sub-licence.

[59] DW1 was referred to cl 1.2 of the 'agreement' which states as follows:

> 1.2. The rights shall not include the television broadcast rights identified in clause 3.1.12 on Page 7 of the said agreement in Annex 1.

Initially, he disagreed that by the inclusion of this clause, the defendant

continued to be liable to BAM for the television broadcast rights although he later corrected himself on this point. He eventually agreed that SMP cannot be responsible for the payment of broadcasting rights. During re-examination, he clarified that the intention was that the defendant would retain the radio and television broadcasting rights whilst SMP would get all the other rights.

[60] DW1 disagreed that his letter of 3 October 2006 did not amount to an agreement because its terms were uncertain and unclear due to the fact that there was no provision of the value that was to be paid by SMP for the sub-licence. He agreed that although only partial rights were being given to SMP vide cl 2.4, the defendant nevertheless expected SMP to pay for all the rights.

[61] DW1 disagreed that the 'agreement' dated 3 October 2006 was no longer valid as the defendant had subsequently granted those same rights to FEP. He was referred to Recital D of the sponsorship agreement which states that:

> FEP has acquired the said exclusive marketing, advertising and commercial rights to the Tournament from ISM.

He insisted that the defendant did not grant any rights to FEP and that he did not know how FEP came to sign the sponsorship agreement with Proton. Notwithstanding the fact that he was also a director and shareholder of FEP at the time when the sponsorship agreement was signed, he claimed to be unaware of the said sponsorship agreement valued at USD1.2m between FEP and Proton. He had also denied that payments from FEP to BAM were taken personally by him to BAM.

[62] According to DW1, BAM was aware of the 'agreement' between the defendant and SMP. Vide a letter dated 5 October 2006 (p 41 of CB1), admittedly signed by DW1, BAM was duly informed of the 'agreement' between the defendant and SMP and thereafter BAM 'had dealt directly with SMP in respect of the sponsorship monies'. DW1 claimed that after the 'agreement' between the defendant and SMP, BAM had never contacted the defendant until the notice of demand was received from BAM.

[63] In his evidence, DW1 went into greater detail about the letter at p 41 of CB1. He claimed that this matter had been discussed with Mr Ganga Rao, the former Honorary Secretary of BAM and Mr T Arasu, the COO of SMP. The letter was also copied to Encik Taufik, the Executive Chairman of SMP. At the material time, DW1 was a director of both the defendant as well as SMP. As regards the last paragraph of the said letter, DW1 told the court that he was asked to put in the last paragraph by BAM.

[64] According to DW1, the defendant had not received any letter or reminder from BAM until receipt of the notice of demand dated 14 June 2010 wherein BAM had alleged that the defendant owed them monies and had demanded the balance sponsorship sum of RM978,978. DW1 admitted that he had not sent copies of the letters of demand to SMP. The defendant replied to the notice of demand vide their letter dated 1 July 2010 (p 56 of CB1) informing BAM that they (BAM) had had direct dealings with SMP and by their conduct had acknowledged SMP as being the party who was obliged to pay the financial obligations of the sponsorship rights due to the transfer of the commercial rights from the defendant to SMP. He also pointed out that BAM had waited for three years before demanding payment from the defendant.

[65] According to DW1, the defendant was not aware of what had transpired between BAM and SMP after the rights were transferred as the defendant was no longer involved with the tournament. He disagreed that as the common director for all three companies — the defendant, SMP and FEP — he was liaising with BAM throughout the tournament.

[66] DW1 claimed that it was only after he had sight of the sponsorship agreement between Proton and FEP some two months after the legal suit was filed that he realised that FEP was dealing directly with BAM. The sponsorship agreement indicates that Proton was the main or title sponsor of the tournament; FEP had acquired the marketing, advertising, and commercial rights of the tournament from the defendant and FEP had transferred the rights as title sponsor to Proton. The recital of the sponsorship agreement states that BAM had granted the commercial rights to the defendant in the first instance and FEP had acquired the commercial rights to the defendant. Further, the sponsorship agreement was witnessed by Dato' Sri Nadzmi Mohd Salleh, the President of BAM, which shows that at all material times, BAM was aware that the commercial rights of the WBC 2007 had been transferred to FEP. DW1 claimed that the rights conferred by FEP to Proton were essentially the same rights as in the marketing agreement between BAM and the defendant.

[67] The court notes that during the course of cross-examination, DW1 had contradicted his evidence-in-chief countless times. He would first say one thing and then change his evidence and say another. For example, he had stated in his evidence-in-chief that the defendant made payments following the schedule. He had then agreed that his answer was incorrect. He had also on many occasions admitted to giving answers to which he had no knowledge. The court notes that he had admitted to having no knowledge of his answers to Q 39, 46–47 and 56.

[68] Stuart John Borrie ('DW2') is the Director of Operations of the World

Badminton Federation ('WBF'). He tendered the official programme for the World Badminton Championship 2007 held in August 2007 ('D1'). He admitted that he joined WBF in 2008 and thus would not have been involved in the 2007 Championship and would have had nothing to do with the contents of D1.

[69] As regards the official programme D1, the page following the cover shows that:

(a) the main sponsor is Proton;

(b) the championship is sanctioned by BWF;

(c) the host is BAM;

(d) the championship is supported by the Ministry of Youth and Sports, Majlis Sukan Negara and Majlis Kecergasan Kebangsaan (National Fitness Council);

(e) the co-sponsors are Yonex, 100 Plus, HP, Eau Claire, Jati, Fuji Xerox and TM;

(f) the event manager is SMP;

(g) the official hotels are Mines and Holiday Villa; and

(h) the broadcasters are RTM and Astro.

[70] Page 12 of D1 sets out the organising committee. According to DW2, the chairman is the president of BAM. The chairman has the overall responsibility of organising the event. There is a working committee working alongside that carries out the day to day operations of the event. FEP and SMP were members of the organising committee but the defendant is not on the list. DW2 recited some of the names in the working committee. Those that he was familiar with included Hj Ahmad Mohd Idris from BAM, Kenny Goh who was the point of contact for all operations and Ganga Rao, the then honorary secretary of BAM.

[71] During cross-examination, DW2 admitted that he had no personal knowledge of the co-sponsors listed in the programme. He did not attend any of the working committee meetings for the tournament and was unable to verify if those listed at page 13 were really members and when they were appointed.

[72] DW2 also tendered a letter from BWF dated 2 March 2007 inviting member associations to compete in the championship as well as key information for members ('D2').

[73] N Selvanayagam a/l Nadarajah ('DW3') is the company secretary of FEP. He tendered documents, inter alia, the reports and financial statements of FEP for the period 27 October 2005–31 december 2006 (D3), the reports and financial statements of FEP tabled at the AGM on 30 June 2009 (D4), the reports and financial statements for the year ended 31 December 2007 (D5) and the reports and financial statements for the year ended 31 December 2008 (D6). D4, D5, and D6 were all prepared in 2009. Mr Rethinavelu (DW1) was a director of FEP from 2005 until 10 March 2008. He was also a director of the defendant from its inception until to date. During re-examination, he agreed that these annual returns were filed on 14 July 2009 after DW1 had resigned.

[74] DW3 admitted that he had not obtained the authorisation of FEP to tender all the documents pertaining to FEP in court. When cross-examined by learned counsel for the third party, he agreed that apart from being a director of the defendant and SMP, he had been appointed as company secretary of FEP as well as SMP from the date of their respective incorporations.

[75] In 2006 and 2007, DW1 and Arasu were the directors of FEP. FEP held an AGM in 2007. However, the audited accounts for 2006 and 2007 were not tabled at the AGM. After being referred to page 7 of CB1, DW3 confirmed that DW1 and Arasu were appointed directors of SMP on 7 July 2006 and remains shareholders until to date. He did not know why the accounts of SMP were not tabled in 2007.

THE CASE FOR THE THIRD PARTY

[76] Sports Media Productions Sdn Bhd ('SMP'), the third party, relied on the evidence of Adlin Murtadza bin Zabri ('DW4'). He was appointed a director of SMP on 1 July 2007 and resigned as director effective 14 June 2011. In October 2006, the directors of SMP were Rethinavelu a/l R Thangiah (DW1), Faridah bt Hj Omar, Mohd Sabri Sulaiman, S Tirunaavuckarsu a/l Singaram ('T Arasu') and Tengku Muzafar bin Tengku Mukhtar.

[77] DW4 confirmed that in October 2006, DW1 was a director of both the defendant as well as SMP. T Arasu was a director of SMP as well as its chief operating officer ('COO'). The letter dated 3 October 2006 (p 57 of CB1) was signed by Arasu.

[78] According to DW4, he was unable to trace any documents, minutes of meetings or board resolutions to show that there were any discussions among the directors of SMP on accepting the sub-licence from the defendant. There was also no resolution or other document to show that Arasu was authorised to

sign on behalf of SMP. Arasu is no longer with SMP, having left the company after the 2007 WBC. DW4 explained to the court that he has lost contact with Arasu.

[79] DW4 told the court that from SMP's records, no formal agreement was ever signed between the defendant and SMP following the letter of 3 October 2006. Moreover, the letter of 3 October 2006 did not state the value of the sponsorship, advertising and commercial rights, excluding the broadcasting rights. In October 2006, there was also no letter from the defendant to SMP to inform them of the amount that had already been paid to BAM. Nor was there any document from the defendant to SMP to inform them of the extent to which they had carried out the promotion, advertising and other matters prior to the alleged sub-licence.

[80] According to DW4, SMP did not conduct any promotion or marketing of the commercial rights in respect of the tournament after October 2006. From the documents made available to him, the rights were subsequently granted by the defendant to another company. SMP did not play any part in the organisation of the tournament, were not paid any monies by any sponsors in respect of the tournament, and did not make any payment to BAM in respect of the tournament. It had not received any benefits from the tournament and did not owe the defendant or BAM any monies in respect of the tournament.

[81] The defendant had not made any formal demand from SMP for payment prior to filing the third party notice. Although they were informed verbally by DW1 about the letter of demand by BAM and the legal letter of demand from BAM's solicitors, however copies of the letter of demand and legal letter were not forwarded to them. Subsequently, they were informed by DW1 about BAM's suit against the defendant.

[82] With reference to the list of members of the working committee at p 13 of D1, DW4 informed the court that he had not attended any of the working committee meetings for the WBC 2007 and did not know why his name was listed as a member. He explained that he was appointed a director in June 2007 and was not involved in organising the WBC 2007. It was the COO, Mr Arasu who was involved. The last time that he had contact with Mr Arasu was in 2007.

[83] During cross-examination by learned counsel for the defendant, DW4 admitted that he had instructed Messrs Faiz & Co to act on behalf of SMP. He confirmed that the defence of the third party at pp 22–24 of the bundle of pleadings was filed on SMP's instructions. He agreed that in paras 3–4 of their defence, the third party had pleaded that there was no concluded agreement

('surat bertarikh 3 Oktober 2006 bukanlah satu perjanjian yang telah disempurnakan ('concluded') atau mengikat'. And in para 5 it was pleaded that not all the rights of the defendant under the agreement between BAM and the defendant had passed to the third party and that, inter alia, 'hak penyiaran television dengan nyata dikecualikan'.

[84] DW4 was referred to the reports and financial statements of FEP for the year ended 30 June 2009 ('D4'), for the year ended 31 December 2007 ('D5') and for the year ended 31 December 2008 ('D6') and he agreed that his signature appears on D4 and D5.

[85] DW4 was asked whether SMP had transferred its rights to FEP on its own accord. He claimed to have no knowledge of that. He told the court that the then CEO, Mr Arasu, would know. However, Arasu is no longer with SMP.

[86] DW4 testified that SMP's office is in Bukit Kiara and is in the same building as BAM and FEP. He agreed that from the official records of BWF, SMP and FEP had taken part with BAM in organising the WBC 2007 event but when things went wrong, they decided to blame the defendant. He agreed that BAM's assertion that they had never dealt with SMP and FEP was a lie.

THE EVALUATION AND FINDINGS

[87] In coming to a decision in this case, the court has carefully perused the evidence adduced by the parties. This includes the documentary evidence which plays a very important part in this case. The court has also received considerable assistance from the written submissions filed by the parties.

[88] The plaintiff's claim in this case is clear and uncomplicated. BAM had entered into a marketing agreement with the defendant whereby they had granted the sole and exclusive rights of all kinds of commercial exploitation of all commercial, promotional, advertising, marketing, and licensing rights in the territory and all broadcasting rights in Malaysia arising from or relating to BAM and/or the World Badminton Championship 2007 event to the defendant. The consideration for the grant of such rights was USD900,000 which was to be paid by the defendant to BAM in the manner as set out in Schedule 3. The court finds that the existence of this marketing agreement dated 15 December 2005, duly executed between the parties, to be proved. There is no suggestion that this is not a valid agreement when it was executed between the parties. As such, the court finds that there is a valid and binding marketing agreement entered into between the BAM and the defendant on 15 December 2005.

[89] The plaintiff contends that BAM had only been paid USD595,000 to

date thus leaving an outstanding sum of USD305,000 due and owing by the defendant. The defendant disputes being liable for the alleged outstanding sum, contending instead that its exclusive rights to the WBC 2007 Tournament had been transferred to SMP vide a letter dated 3 October 2006 whereby it had relinquished some of its rights including rights of commercial exploitation, sponsorship and advertising to SMP ('telah melepaskan beberapa haknya, termasuk hak exploitasi komersial, hak menaja (sponsorship) dan hak pengiklanan antara lain'). The existence of such a letter is not in dispute. What is in dispute and to be decided by the court is the effect of this letter — whether it amounts to a valid and binding contract between the defendant and SMP. And if it is determined that the letter of 3 October 2006 is a valid contract between the defendant and SMP, a further issue is whether that contract would have the effect of transferring all the defendant's obligations to the plaintiff in respect of the payment of monies under the marketing agreement, to SMP?

[90] The court has carefully perused the letter of 3 October 2006 in light of the different positions taken by the different parties. As far as the plaintiff is concerned, it is not a party to this 'agreement' of 3 October 2006. As for the third party, it contends that the letter of 3 October 2006 is not even a concluded agreement.

[91] The court will deal with this issue in two steps. The first stage is to consider the position between the plaintiff and the defendant. The alleged 'agreement' of 3 October 2006 is between the defendant and SMP. The plaintiff was not a party to the said 'agreement'. From the documents before the court, the earliest the plaintiff would have known about the 'agreement' would be when they received a copy of the defendant's letter to them dated 5 October 2006 informing them about the sub-licence to SMP. In this letter which is dated two days after the date of the alleged 'agreement', SMP was described as an 'associate company' and the reason for the sub-license was 'to streamline our operations'. However, the court finds that the most important and pertinent portion of this letter is the last paragraph which reads as follows:

> ISM shall remain the contracting party with the BAM and be responsible for the terms of the agreement including the financial obligations.

[92] The court finds that it is because of this paragraph which has the effect of declaring that notwithstanding the sub-license to SMP, the defendant would nevertheless remain the contracting party with BAM that the plaintiff had neither objected to the sub-licence nor responded to the letter of 5 January 2006.

[93] The court finds that the plaintiff is not in error when they took the position that as far as they were concerned; they had only contracted with the

defendant. The fact that monies were received from parties other than the defendant towards the account of the defendant did not change that position. The court recalls the evidence of PW 2 that it was normal for payments to be received from parties other than the contracting parties. In this case, not all payments received by BAM towards the account of the defendant were made by the defendant. Some payments were made by FEP and these payments were received towards the account of the defendant.

[94] How much has been paid towards the account of the defendant to date? Evidence was led by Manoharan a/l PP Krishnasamy (PW3), the finance and marketing manager of BAM, to the effect that only four payments were made by the defendant or towards the account of the defendant under the marketing agreement. The court recalls his evidence that the 'Statement As At 31st December 2009' was prepared by him although it was signed by Kenny Goh (PW4). PW3 testified in evidence that a total of USD595,000 was paid by the defendant or by others towards the defendant's account. On 16 March 2006, USD40,000 was paid by the defendant. In actual fact, USD50,000 was received by BAM but upon inquiry, DW1 had confirmed that USD40,000 was paid towards the WBC 2007 whilst USD10,000 was paid for the Asian Badminton Championship. On 31 May 2007, USD100,000 was received from FEP towards the defendant's account. On BAM's instructions to the defendant, USD200,000 less bank charges was paid directly to the International Badminton Federation (IBF) on behalf of BAM in respect of the World Badminton Championship 2007 event. This payment was accounted as USD200,000 on 31 July 2007 into the defendant's account. And on 22 October 2007, USD 255,000 was received from FEP. These four payments added up to USD595,000, thus leaving an outstanding balance of USD305,000.

[95] Learned counsel for the plaintiff has submitted that the defence pleadings on the issue of the amount paid and by whom is contradictory. In para 12 of the statement of defence, the defendant has pleaded that only USD65,000 was paid by the defendant to BAM, made up of USD50,000 on 16 March 2006 and USD15,000 on 15 June 2006. In para 13 of the statement of defence it is pleaded that USD595,000 was paid directly by SMP to the plaintiff. In this regard the court notes that:

(a) if indeed USD65,000 was paid, the defendant should, at the very least, be able to produce some documentary proof of such payment. The court notes that no documents or receipts evidencing payment of USD65,000 was produced by the defendant;

(b) the evidence of the plaintiff's witnesses that only USD40,000 out of the USD50,000 paid on 16 March 2006 was paid towards the WBC 2007.

The remaining USD10,000 was paid towards the Asian Badminton Championship. This evidence was not seriously challenged by the defendant; and

(c) paragraph 13 of the statement of defence which states that USD595,000 was paid by SMP is in direct contradiction with the evidence of DW1 that no payments at all were made by SMP to BAM.

[96] In light of these serious inconsistencies in, and the insufficiency of, the defence evidence as regards the amount that was paid, the court finds that the evidence of the plaintiff's witnesses as regards the amount that had been paid towards the account of the defendant to be infinitely more reliable and credible. The court thus finds that the plaintiff has succeeded in proving, on a balance of probabilities, that USD595,000 was the total amount that had been paid towards the defendant's account in respect of the WBC 2007.

[97] Learned counsel for the plaintiff had submitted that the defence contention that they are not liable to the plaintiff because they had granted some of the rights granted to them by BAM to SMP to be totally without basis. The word 'some' is used because it is obvious from the letter or 'agreement' of 3 October 2006 that television broadcast rights are not included among the rights which were to be sub-licensed to SMP. That being the case, the court has next considered the issue of privity of contract as raised by learned counsel for the plaintiff in his submissions.

[98] What is the doctrine of 'privity of contract'? A contract creates rights and obligations, but only between parties. It does not confer rights or obligations on a stranger. In the case of *Suwiri Sdn Bhd v Government of the State of Sabah* [2008] 1 MLJ 743; [2008] 1 CLJ 123, the Federal Court had occasion to deal with the issue of privity of contract. One of the questions for determination by the Federal Court is whether the letter of approval signed by the *setiausaha hasil bumi* and communicated to the appellant had created a binding contract to renew or extend the timber licence.

[99] In *Suwiri Sdn Bhd*, the appellant was granted a license to fell and extract timber in a forest reserve in Keningau, Sabah, comprising an area of 5,665.59 hectares. The licence was valid for a period of five years from 13 March 1993–13 March 1998. The appellant, being unable to extract the timber in the area within the period stated in the licence, made an application for extension of time to the *setiausaha hasil bumi*, Datuk William Shin citing the rainy weather and poor road conditions as the reasons for being unable to complete the extraction within the time stipulated.

[100] The *setiausaha hasil bumi*, in his letter dated 25 November 1997 to the

director of forestry, stated that he agreed to have the licence renewed for the whole of the concession area of 5,665.59 hectares for a period until 31 December 1999 but subject to a survey being carried out by the director of forestry and the provisions of the Sabah Forest Enactment 1968. However, contrary to what had been indicated by the *setiausaha hasil bumi*, the respondent decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares with the remaining area being distributed to other companies under other licenses. The appellant was dissatisfied with the decision of the respondent and initiated proceedings in the High Court against the respondent claiming damages for breach of contract and other declaratory reliefs.

[101] The High Court allowed the appellant's claim with costs and awarded damages and interests. On appeal by the respondent, the Court of Appeal by a majority reversed the decision of the High Court and dismissed the appellant's claim with costs. Hence, the appeal to the Federal Court.

[102] On the issue of privity of contract, the Federal Court found that the letter of approval relied upon by the appellant was actually a letter written by the *setiausaha hasil bumi* to the director of forestry, an internal communication between them which was not copied to the appellant, although the appellant had managed somehow to obtain a copy. The Federal Court found that based on the doctrine of privity of contract, 'the appellant would have no locus or right to enforce the content of the alleged letter of approval in favour of the appellant'. The Federal Court, in arriving at its decision, also relied on and referred to two other cases as follows:

> The principle in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 is a clear example on the rule of privity of contract. The House of Lords in this case stated:
>
> > … In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.
> >
> > Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.
>
> In *Schmidt v Kepong Prospecting Ltd & Ors* [1964] 1 MLJ 416; [1964] 1 LNS 183 the Federal Court recognised the application of the doctrine of privity of contract in Malaysia that a person who is not a party to a contract cannot take advantage of provisions of the contract. In this case, the appellant assisted one Tan to obtain a prospecting permit where Tan promised to pay the appellant a tribute of 1% of the selling price of iron sold. Subsequently an agreement in 1954 was made between a company and Tan under which the company took over Tan's obligation to pay the 1% tribute. The appellant was not a party to this agreement. In 1955 an agreement was made between the company and the appellant where the

company agreed to pay the appellant the 1% tribute. The appellant claimed for the tribute but the company argued that the 1954 agreement was not enforceable as the appellant was not a party to it. The Federal Court agreed with the company where the 1954 agreement could be enforced only by the company or Tan; who were the only parties to the contract.

[103] The decision of the Federal Court in *Suwiri Sdn Bhd v Government of the State of Sabah* has been followed by the Court of Appeal in various cases such as *Woolley Development Sdn Bhd v Stadco Sdn Bhd(No 1)* [2011] 6 MLJ 111; [2010] 7 CLJ 73 and *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822; [2010] 3 CLJ 818.

[104] Applying the afore stated authorities to the facts of our instant case, the court finds that the marketing agreement dated 15 December 2006 was between BAM and the defendant. SMP who has been brought in by the defendant as a third party for indemnity was not a party to the marketing agreement. Applying the doctrine of privity of contract, the plaintiff would have no right to enforce the terms of the marketing agreement against any party other than the defendant. Although the plaintiff was informed about the alleged sub-licence or 'agreement' between the defendant and SMP AFTER the fact, and although the plaintiff would have known about sub-licenses or other arrangements with SMP and FEP, however that knowledge would not change the fact that the marketing agreement was between the plaintiff and the defendant and all the rights and obligations under the said agreement would only be between the plaintiff and the defendant.

[105] In light of the defendant's averments and the third party notice issued by the defendant against SMP, and the pleadings of both the defendant and SMP in this regard, the court has next considered the issue of whether there was a binding agreement between the defendant and SMP arising out of the alleged sub-licence or 'agreement' arising from the letter of 3 October 2006.

[106] The letter of 3 October 2006 is a letter signed by DW1 as 'director' on the defendant's letterhead. The court thus understands that this is a letter written by DW1 in his capacity as a director of the defendant. It is addressed to SMP for the attention of 'Mr ST Arasu Chief Operating Officer'. It refers to recent discussions 'regarding the sub-license of the commercial rights' held by the defendant and confirms their agreement 'to sub-license the said rights' to SMP on terms as set out there under. Of material significance is cl 1.2 which specifically states that 'The rights shall not include the television broadcast rights identified in Clause 3.1.12 on Page 7 of the said agreement in Annex 1.' As such, the court finds that even if the letter of 3 October 2006 can be said to constitute an agreement between the defendant and SMP, that agreement would not be in respect of all the rights granted to the defendant by the plaintiff

under the marketing agreement but would not include television broadcast rights. It cannot be gainsaid that at this time of live television broadcasts, these television broadcast rights which were not included in the sub-license would form a valuable part of the grant of rights which were granted by the plaintiff to the defendant.

[107] The court has considered the submissions of learned counsel for the third party that the letter of 3 October 2006 does not constitute a valid and concluded agreement between the parties, namely the defendant and SMP. The court has considered this submission and is of the considered view that the said submission has considerable merit. Based on the oral evidence adduced and the documentary evidence before the court, the court finds that:

(a) there is nothing in the letter about the consideration that is to be paid by SMP to the defendant for the sub-licence. The plaintiff was to receive USD900,000 from the defendant for the grant of rights under the marketing agreement. But what is the defendant to receive from SMP for the grant of those rights from the defendant less television broadcast rights? The letter is strangely silent on this. The court is of the considered view that even if it was the intention of the parties that nothing was to be paid for the sub-licence by virtue of the fact that SMP was an 'associate company' of the defendant, this fact should have been clearly stated in the letter/'agreement'. By being silent on this issue of the consideration to be paid by SMP, the defendant lays itself open to the suggestion that the 'agreement' was an incomplete one and there were more issues which were yet to be resolved and agreed between the parties;

(b) under cl 2.4 of the letter/'agreement', SMP was to fulfil all the financial obligations, undertakings and covenants of the defendant in accordance with the marketing agreement. However, the letter/'agreement' is silent on the extent to which the defendant had already fulfilled the terms of the marketing agreement. Unless this is known, it would have been difficult for SMP to know what obligations remain to be fulfilled by them. From the evidence adduced, as at the date of the letter/ 'agreement' (3 October 2006), the defendant had already paid USD40,000 to the plaintiff towards their account. This should have an effect on the extent of the financial obligations that remain to be fulfilled by SMP; and

(c) the question arises as to whether it was the intention of the defendant and SMP that SMP should be obligated to fulfil all the financial obligations of the defendant under the Marketing Agreement when they were not granted all the rights under the said marketing agreement. The value of the television broadcast rights must have been worth a substantial amount. The court finds that the issue of the extent of SMP's undertaking to fulfil the financial obligations of the defendant to the plaintiff remains unclear.

[108] The court notes the evidence of DW4 for the third party that after October 2006, the date of the alleged sub-licence, SMP had not conducted any promotion or marketing of the commercial rights in respect of the tournament. SMP did not take any part in the organisation of the tournament, were not paid any monies by the sponsors of the tournament and nor had they made any payments to BAM in respect of the tournament. The court notes that not only was the fact that SMP had not made any payments whatsoever to the plaintiff confirmed by the witnesses of the plaintiff, but this was also confirmed by DW1 for the defendant.

[109] On the contrary, from the evidence adduced, monies were received by the plaintiff from FEP towards the defendant's account. This evidence lends weight to SMP's contention that they were not the right party to be sued as there was obviously some other arrangement made whereby FEP had obtained some rights otherwise it would not have been making payments to the plaintiff towards the defendant's account. The court does not propose to go into how FEP had come into the picture as insufficient evidence has been led on this issue before the court.

THE CONCLUSION

[110] Looking at all the evidence adduced in this case, the court finds that the plaintiff has succeeded in proving, on a balance of probabilities, its case against the defendant. The court finds that there was valid and binding marketing agreement between the plaintiff and the defendant which obligates the defendant, inter alia, to pay the plaintiff USD900,000 for the rights granted to it. Notwithstanding the fact that the defendant had sought to inform the plaintiff after the event of the alleged sub-licence of their rights in the marketing agreement to SMP, the court finds that the plaintiff was not a party to the alleged sub-licence. The court further finds that the defendant's obligations to pay the plaintiff was not absolved by the alleged sub-licence as it had, when informing the plaintiff about the sub-licence, clearly expressed and confirmed that it remains the contracting party with the plaintiff and would be responsible for all the terms of the marketing agreement, including the financial obligations. The court is of the considered view that the defendant cannot go back on what it has contracted and undertaken to be responsible. As such, the court finds that the defendant liable to the plaintiff for the outstanding sum of USD305,000.

[111] As regards the defendant's claim against the third party, SMP, for indemnity against the plaintiff's claim, the court finds that the defendant has failed to make out its case against the third party on a balance of probabilities. Quite apart from the fact that the letter of 3 October 2006 would appear to be less than a concluded agreement between the defendant and SMP, there is also

an additional question of whether T Arasu, who agreed and accepted the alleged sub-licence from the defendant, was authorised by the board of directors of SMP to do so. In this regard the court is of the considered view that DW1 as a common director of the defendant, SMP and FEP had failed to draw strict lines between his roles in the various companies. Sub-licences and rights cannot be arbitrarily passed from one to another without proper authorisation as to both the giving and the acceptance. Terms and conditions that govern the passing of rights have to clearly spelt out. When this is not done, the defendant cannot fall back on the alleged knowledge of certain individuals who wear more than one hat in the three different companies.

[112] In the final analysis, since the court has found that the defendant has failed to prove its case for indemnity from SMP on a balance of probabilities, the court herewith orders the defendant to pay to the plaintiff the sum of USD305,000 or its equivalent in Malaysian Ringgit, interest at the rate of 4%pa on the said sum of USD305,000 or its equivalent from the date of filing the writ until the date of full settlement. The court also awards costs to both the plaintiff and the third party against the defendant, such costs to be taxed unless otherwise agreed.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed